IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

~~76~~-1773

No. ———

TEXAS INTERNATIONAL AIRLINES, INC.; DELTA AIR LINES, INC.; AMERICAN AIRLINES, INC.; FRONTIER AIRLINES, INC.; OZARK AIR LINES, INC.; EASTERN AIR LINES, INC.; AND CONTINENTAL AIR LINES, INC.,
Petitioners,

v.

SOUTHWEST AIRLINES CO. AND
THE TEXAS AERONAUTICS COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Texas International Airlines, Inc.; Delta Air Lines, Inc.; American Airlines, Inc.; Frontier Airlines, Inc.; Ozark Air Lines, Inc.; Eastern Air Lines, Inc.; and Continental Air Lines, Inc., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered on January 28, 1977, which affirms an injunctive order from the District Court for the Northern District of Texas enjoining and restraining petitioners

from litigating in state court or in other court action certain matters said to have been determined by a prior judgment of the federal court.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which is sought, is reported at 546 F.2d 84 and is set forth at page 1a of the separately-bound Appendix to this petition. Earlier opinions in this and related litigation, also set forth in the Appendix, are reported as follows:

(1) The opinion of the District Court for the Northern District of Texas, dated June 21, 1973, granting a declaratory judgment in favor of Southwest Airlines Co. in a suit against it by the Cities of Dallas and Fort Worth and by the Dallas-Fort Worth Regional Airport Board, is reported as *City of Dallas, Texas* v. *Southwest Airlines Co.*, 371 F.Supp. 1015. (App. 1d).

(2) The opinion of the Court of Appeals for the Fifth Circuit, dated May 31, 1974, affirming the District Court's grant of a declaratory judgment, is reported as *City of Dallas, Texas* v. *Southwest Airlines Co.*, 494 F.2d 773. (App. 1c).

(3) The opinion of the District Court for the Northern District of Texas, dated June 5, 1975, enjoining the present petitioners from litigating certain issues in state court, is reported as *Southwest Airlines Co.* v. *Texas International Airlines, Inc.*, 396 F.Supp. 678. (App. 1b).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 28, 1977. Timely petitions for rehearing were filed on February 11, 1977, and denied on March 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is it permissible under the Due Process Clause to hold that a judgment in a suit brought by a governmental unit precludes subsequent litigation by private parties who did not participate in the prior suit, when those private parties have separate and distinct interests different from those of the general public?

2. Do principles of equity, comity, and federalism permit a federal court to enjoin state court litigation on unclear questions of state law, dealing solely with the internal regulatory systems of a state, in order to protect and effectuate an earlier federal court judgment that made a forecast of the state law on the point?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the separately-bound Appendix beginning at page 1e. They include the following:

1. United States Constitution, Amendment V. (App. 1e).

2. United States Code, Title 28, Section 2283. (App. 1f).

3. Texas Constitution, Article 11, Section 5. (App. 1g).

4. Texas Aeronautics Commission Act, Texas Revised Civil Statutes Annotated, Article 46c-6, Subdivisions 1 and 3. (App. 1h).

5. Texas Municipal Airports Act, Texas Revised Civil Statutes Annotated, Article 46d-7. (App. 1i).

6. 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Fort Worth, Sections 2.1G and 9.5A. (App. 1j).

STATEMENT OF THE CASE

Background of the Controversy

This dispute began with a Civil Aeronautics Board ("CAB") order in 1964, requiring the Cities of Dallas and Fort Worth to designate a single airport for CAB-approved service in their region. To comply with this order, the cities agreed to construct the Dallas-Fort Worth Regional Airport ("DFW") at a point midway between them. In implementing the agreement, they adopted the 1968 Regional Airport Concurrent Bond Ordinance. Besides authorizing the issuance of revenue bonds, the ordinance provided for a phase-out of scheduled air service at Love Field, Dallas (the "phase-out provision"). In 1970 the eight airlines certificated by the CAB to serve Dallas and Fort Worth, including the present petitioners, executed Letter Agreements with the Dallas-Fort Worth Regional Airport Board agreeing to "move all of [their] Certificated Air Carrier Services serving the Dallas-Fort Worth area to the [new] airport * * * to the extent required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance." The Letter Agreements also provided that the carriers that entered into them agreed to pay rentals, fees, and charges to the Regional Airport Board that, together with amounts paid by other users of the airport, would be sufficient to produce enough revenue to pay the operating and maintenance expenses of the airport plus 1.25 times the debt requirements on the Regional Airport revenue bonds. Thus the CAB carriers agreed to underwrite the costs of DFW on the understanding that scheduled services would be precluded at Love Field.[1]

[1] All parties recognized that unless Love Field was substantially closed to scheduled traffic it would be impossible to generate revenue at DFW sufficient to pay its cost because of the tendency of the public to use the airport closest to the largest population center. For this and other reasons, the Federal Aviation Administration insisted that it would not grant federal funds to DFW unless Love Field was closed to scheduled flights. *See* 5th Cir. No. 73-2748, App. Vol. 3, p. 942.

In 1971 Southwest Airlines, a purely intrastate carrier, began scheduled air service from Love Field under a certificate of public convenience and necessity issued by the Texas Aeronautics Commission ("TAC"). The certificate authorized Southwest to provide service between the points Dallas/Fort Worth, Houston, and San Antonio "at any airports serving those points named herein." The certificate did not mention Love Field. On November 12, 1971, the TAC, without notice of hearing to anyone, adopted Minute Order No. 22. It provided: "From and after the date hereof, no air carrier operating under a Certificate of Public Convenience and Necessity issued by the Commission shall, without the prior written approval of the Commission, discontinue all air service to any airport through which such carrier presently provides air service."[2] The order did not mention Southwest or Love Field.

The City of Dallas Case

Southwest refused to enter into a Letter Agreement with the Regional Airport Board and made known its intention to continue operating from Love Field. In 1972 the cities and the Airport Board filed suit in federal court requesting a declaratory judgment of their right to exclude Southwest from Love Field. Southwest counterclaimed for a declaration of its right to remain at the field and for an injunction to enforce that right.

The CAB carriers were not parties to this action, although Southwest could have joined them as parties on its counterclaim as provided by Fed. R. Civ. P. 13(h). When the case came on for hearing, Southwest moved to

[2] The minutes of the TAC meeting reflect that the adoption of Minute Order No. 22 was one of seven items of business at a meeting that lasted exactly 60 minutes.

"hold in abeyance for want of indispensable parties," explaining twice to the court that the reason for its motion was that unless the CAB carriers were joined, any determination in the case would not be binding on them.[3] Counsel for Southwest also told the court: "This is why any decree entered herein will begin rather than end litigation for all parties at interest over what is a single controversy over the meaning of that ordinance."[4] The court refused to hold the case in abeyance and ruled that it would not "let any new parties be brought in at this time."[5]

The District Court then ruled for Southwest on a variety of grounds, some based on federal law and others on state law. It held that the cities and the Board could "not lawfully exclude the defendant, Southwest Airlines Co., from the use of Love Field, Dallas, Texas, and its airport facilities so long as Love Field remains open as an airport." 371 F.Supp. at 1035 (App. 34d).

In 1974 the Fifth Circuit affirmed this judgment. That court found it "unnecessary to discuss" any of the federal grounds that were the basis for federal jurisdiction and that had been relied on in part by the District Court. 494 F.2d at 777 (App. 7c). It rested its decision solely on its understanding that the power of the TAC under Texas law includes the power to determine the points of origin and destination of flights, that "Southwest has been certificated by the Commission into Love Field and directed to continue service there until told otherwise," and that "Dallas being Texas' creature, it may not declare otherwise." 494 F.2d at 777 (App. 6c).

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[3] 5th Cir., No. 73-2478, App. Vol. 2, pp. 466, 468, 473.

[4] *Id.* at 469.

[5] *Id.* at 480.

The State Litigation

Other litigation, not presently relevant, then followed.[6] The next relevant litigation is a suit instituted by Texas International on December 10, 1974, in the 200th District Court in Austin, Texas. Texas International contended that the phase-out provision of the 1968 Bond Ordinance is valid under Texas law and that the TAC certificate and order, under Texas law, did not and could not have the effect attributed to them by the federal courts in the *City of Dallas* case. In the alternative, Texas International urged that if the phase-out provision was invalid, the CAB carriers should be held to be excused from their obligation under the Letter Agreements to transfer their services to DFW and from their financial obligation. The complaint in the state action named as principal defendants the Regional Airport Board, the Cities of Dallas and Fort Worth, and the TAC. Joined also as defendants because of their interest in the subject matter of the litigation were the other CAB airlines and Southwest. Most of the CAB carriers admitted most of the allegations of the complaint, though some of them also prayed that Dallas be required to close Love Field as an airport if this was the only way to comply with the phase-out provision.

Southwest and the TAC filed pleas in abatement and to the jurisdiction as well as answers. They fully participated in the state court case by filing briefs and participating in extensive oral argument of their pleas at a hearing in the state court on February 21, 1975. In this hearing they argued that the state action was foreclosed by the federal judgment in the *City of Dallas* case. Their pleas were overruled.

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[6] That litigation is briefly described in the most recent opinion from the Fifth Circuit. 546 F.2d at 88 (App. 3a).

The Present Litigation

One month after the state court hearing Southwest filed the present action in the District Court for the Northern District of Texas seeking to enjoin so much of the state court proceeding as attempted to exclude Southwest from Love Field so long as it remains open as an airport. The District Court held that the CAB carriers were bound by the judgment in the earlier case to which they were not parties, on the alternative theories that litigation by the cities made the doctrine of "virtual representation" applicable or that the Letter Agreements between the CAB carriers and the Regional Airport Board created a "privity relationship" between them. 396 F.Supp. at 684-686 (App. 10b-16b).

The case then went to the Fifth Circuit and produced the judgment of which review is now being sought. The exercise of federal jurisdiction was upheld on the ground that this action was "supplemental or ancillary" to the *City of Dallas* case. 546 F.2d at 89-90 (App. 7a-9a). The Fifth Circuit expressly rejected the theories of "privity by letter agreement" and "virtual representation" that had been relied on by the District Court. 546 F.2d at 96-97 (App. 21a-24a). Nevertheless, the judgment below was affirmed on the theory that "[b]ecause legal interests of the carriers do not differ from those of Dallas in *Southwest I*, we hold that they received adequate representation in the earlier litigation and should be bound by the judgment in that litigation." 546 F.2d at 100 (App. 30a-31a).

REASONS FOR GRANTING THE WRIT

This case, in its present posture, raises no issue about whether Southwest Airlines should fly from Love Field or DFW. Instead it raises fundamental due process issues on the extent to which one may be bound by a judgment in an action to which he is not a party. It raises also issues of federalism and comity concerning the ex-

tent to which a federal court may use the "relitigation" exception to the Anti-Injunction Act, 28 U.S.C. § 2283, to protect a federal judgment that rested solely on a forecast of what state law might be on an unclear issue of internal state affairs. These questions of due process and of federalism are issues on which only this Court can speak with authority, and they are issues of such importance to the constitutional scheme that this Court has a particular responsibility to provide authoritative guidance about them.

The Fifth Circuit has decided important questions of federal law that either have not been, but should be, settled by this Court or that were decided below in a way in conflict with applicable decisions of this Court and of another court of appeals. These questions should be heard here.

1. Due Process Denied

It is beyond dispute that the extent, if any, to which a judgment can be given preclusive effect on one not a party to the action is not a mere nicety of the law of res judicata but is a constitutional question, controlled by the Due Process Clauses. *Hansberry* v. *Lee*, 311 U.S. 32 (1940).[7] This Court has recently summarized the applicable doctrine.

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

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[7] Even on res judicata issues that do not reach constitutional proportions, the court below was surely right in holding that the binding effect of a federal court judgment is determined by federal law. 546 F.2d at 94 (App. 17a). *See* Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971). Some of the issues presented by the CAB carriers in the state action are identical to issues decided by the federal courts in the *City of Dallas* case. That fact alone cannot deprive them of their constitutional right to their own day in court on these issues, since they were not parties to that case.

The CAB carriers can be precluded by the prior judgment only if the relation of the cities and the Board, the parties in the first case, to the CAB carriers "is such as legally to entitle the *former* to stand in judgment for the latter." *Hansberry* v. *Lee*, 311 U.S. 32, 43 (1940). That kind of question has traditionally been phrased in terms of "privity," but, as Judge Wisdom writing for the court below correctly recognized, "'privity' denotes a legal conclusion rather than a judgmental process." 546 F.2d at 95 (App. 19a). A current project of the American Law Institute, *Restatement Second of Judgments*, offers a more sophisticated analysis that avoids the use of conclusory terms such as "privity"—and "virtual representation"—and attempts instead to identify the various relationships that may permit an absentee to be bound by a judgment. Sections 78 to 88 of that work speak to the effect of judgments on parties and persons represented by parties, while §§ 89 to 111 take up substantive legal relationships resulting in preclusion.[8]

The court below rejected the arguments on which the District Court had held the CAB carriers bound. It found

[8] The fruits of this work so far appear in four Tentative Drafts, No. 1 (1973), No. 2 (1975), No. 3 (1976), and No. 4 (1977). When references are made to particular sections of *Restatement Second*, the draft in which it appears will be identified. All of the portions of *Restatement Second* referred to in this petition have been approved by the Institute, subject only to editorial changes, most recently with the approval of Tentative Draft No. 4 on May 18, 1977.

no merit in the contentions that the Letter Agreements between the carriers and the Airport Board created either "concurrent privity" or "successive privity" and it did not believe that a generalized doctrine of "virtual representation" was a legitimate basis on which to bind the CAB carriers. 546 F.2d at 96-98 (App. 21a-24a). Instead the court, while recognizing that "the federal judiciary has never faced the precise question posed by the instant facts" 546 F.2d at 98 (App. 27a), thought it found in § 85(d) of *Restatement Second of Judgments* (Tent. Dr. No. 2, 1975), and in Comment *d* to that section, support for the proposition that the CAB carriers were adequately represented by the governmental agencies that brought and lost the first action. It seems clear, however, that the court misconstrued and misapplied both § 85(d) and the law that it restates.

Section 85(d) of *Restatement Second*, on which the Fifth Circuit relied, provides in relevant part:

> A person is represented by a party who is:
>
> * * *
>
> (d) An official or agency invested by law with authority to represent the person's interests.
>
> * * *

Comment *d*, at 61, expands on that by saying that "a public official may have authority to maintain or defend litigation on behalf of individuals or of a collective public interest." The Comment goes on to distinguish three classes of cases, of which the court found the second was applicable to the present case. The second category includes cases in which "the authority of the public official or agency is coexistent with that of individuals or members of the public, such as citizens or taxpayers," but "the official or agency's authority to maintain or defend litigation concerning the interest should be con-

strued as preempting the otherwise available opportunity of the individual or members of the public to prosecute * * *." *Id.* at 62. The court found that it should be so construed in this case on the basis that the "legal interests of the carriers do not differ from those of Dallas" in the *City of Dallas* case. 546 F.2d at 100 (App. 30a).

There are several difficulties with holding that this rule can be applied to preclude the CAB carriers in the present case. The first is that there is very little case authority to support it, particularly as applied to the present facts. As the court below noted, 546 F.2d at 99 n. 55 (App. 28a), the only federal case mentioned in the Reporter's Note on this second category of Comment *d*, *id.* at 68, is *Patterson* v. *Burns*, 327 F.Supp. 745 (D. Haw. 1971). It is precedent against preclusion in this category of cases and is so cited by the Reporter. Of the four state cases cited by the Reporter in support of preclusion, two are distinguished by the Fifth Circuit itself as cases in which private parties lacked standing to sue, 546 F.2d at 99 n. 56 (App. 29a), while in the other two the present ground was either an alternative basis for decision or, though arguably present, was not discussed by the court. 546 F.2d at 99-100 (App. 29a-30a).

A second and conceptually more important problem is that *Restatement Second* itself makes clear that it does not reach the facts of this case. The Reporter's Note is explicit that an action by a public official may be held preemptive of private remedies and a preclusive effect given to it only where "the interest to be protected is one held by members of the public at large." *Restatement Second* (Tent. Dr. No. 2, 1975), at 68. There is nothing in the *Restatement* rules that would extend preclusion to a case like this where the interest of the carriers, who have underwritten the costs of the airport and its financing, is quite distinct from that of the mem-

bers of the public at large.[9] Indeed the Fifth Circuit recognized this when it said that the pecuniary interest of the CAB airlines

> surpasses the interests possessed by members of the general public or taxpayers. If Southwest directs business away from the new facility, the other airlines will face higher per flight landing charges, which could damage their competitive positions in the Dallas-Fort Worth market. Members of the general public or taxpayers would suffer no corresponding risk because they have assumed no responsibility to finance the airport.

546 F.2d at 98-99 (App. 27a).

Under the *Restatement* analysis, and under sound principles of law, the cities and the Board who brought the first suit can fairly be regarded as representatives of the citizens and taxpayers generally of the Dallas-Fort Worth area. They cannot be regarded as the representatives of the airlines who, unlike the cities and the Board, have a direct and substantial financial stake in whether Southwest is allowed to use Love Field.[10]

An instructive case is *Kersh Lake Drainage District* v. *Johnson*, 309 U.S. 485 (1940). Creditors of a drainage district successfully sued to establish their claim against the district, and then sought to enforce their judgment

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[9] The Reporter for *Restatement Second* had commented that to try to bring the present case within § 85 "would attenuate the concept of representation to a point where it would be as amorphous as 'privity,' and we would be back where we were before." Comment, *The Expanding Scope of the Res Judicata Bar*, 54 TEXAS L. REV. 527, 544 n. 92 (1976). At the Annual Meeting of the American Law Institute on May 18, 1977, the Reporter, Professor Geoffrey C. Hazard, Jr., of the Yale Law School, said of the decision below in the present case: "The decision is wrong."

[10] An affidavit submitted in the District Court shows that the cost to the CAB carriers from landing fees and concession revenues diverted to Love Field is in the range of $1 million per year.

by requiring the district to assess and collect taxes against property owners in the district. One defense unsuccessfully asserted by the district in the enforcement proceeding was that some of the property owners had already fully paid their obligations to the district. This Court ruled unanimously that the district represented all landowners in the litigation on the total collective obligation of the district as an entity, but that even though it attempted to protect the interest of the particular owners who had fully paid, their interest was personal and peculiar to them and they could not be precluded by the district's unsuccessful efforts on their behalf.

In a somewhat different context, this Court has recently noted that when "two distinct interests" are "related but not identical," then "they may not always dictate precisely the same approach to the conduct of litigation," and a union member, who had only one of the interests, was not adequately represented by the Secretary of Labor, who was charged by law with protecting both. *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528 (1972). The financial interest of the CAB carriers in enforcing the phase-out of Love Field service is not the same as the governmental interest that motivated the cities and the Board. The carriers are entitled to be heard in support of their own interest.

The significance of this divergence in interest, in terms of due process, is highlighted by the fact that in the *City of Dallas* case the District Court refused to consider arguments from the cities and the Board about the financial effect of not excluding Southwest from Love Field. It noted that under the Letter Agreements

> the Regional Airport receives the same amount of revenues annually whether Southwest Airlines is there or at Love Field. Any diversion which occurs constitutes, at most, an added cost to the CAB carriers. It does not penalize the Regional Airport Board or the citizens of Dallas and Fort Worth.

371 F.Supp. at 1025 (App. 15d). In *Hansberry* this Court said that due process is violated "in cases where it cannot be said that the procedure adopted fairly insures protection of absent parties who are bound by it." 311 U.S. at 42. In this case no procedure at all was adopted to protect the absent CAB carriers and their interest was explicitly disregarded.

Indeed, even if the airlines could be said to have been represented by the governmental agencies within § 85(d) of the *Restatement*, this case would fall into an established exception to preclusion. Under § 68.1(e)(i) of *Restatement Second* (Tent. Dr. No. 4, 1977), preclusion, though otherwise applicable, does not apply if "[t]here is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on * * * the interests of persons not themselves parties in the initial action * * *." Comment *h* to that section, at 40, says in part:

> There are many instances in which the nature of an action is such that the judgment will have a direct impact on those who are not themselves parties. For example, an agency of government may bring an action for the protection or relief of particular persons or of a broad segment of the public * * *. In such cases, when a second action is brought, due consideration of the interests of persons not themselves before the court in the prior action may justify relitigation of an issue actually litigated and determined in that action.

The state suit is by the only persons with a direct financial interest in the outcome. The financial consequences were deliberately excluded from consideration in the first suit, to which they were not parties. That in itself is a convincing reason to allow these persons to litigate the issue and argue their interest, but the situation is made even more compelling since the District Court refused to

allow joinder of the CAB carriers, even though their joinder would appear to have been required under Civil Rule 19(a) on Southwest's motion explaining the interests of the CAB carriers.

Yet another reason for not precluding the CAB carriers, even if it could be held that they were represented in the first action, is that Southwest never expected the CAB carriers to be bound and was exposed to no unexpected burden by the state court suit. Even as between a single plaintiff and a single defendant, there can be multiple litigation, though preclusion would ordinarily apply, if the "defendant has acquiesced therein." *Restatement Second of Judgments* § 61.2(a) (Tent. Dr. No. 1, 1973). At the outset of the *City of Dallas* case, Southwest repeatedly asserted that any determination in that case would not be binding on the CAB carriers.[11] As late as January 1975, after the *City of Dallas* case had been fully decided and Texas International had begun the state court litigation, Southwest, in a brief in federal court in a related action, said:

> The intervenor-defendants Delta and American were not parties to the original action—either before this Court or the Court of Appeals—and, consequently, are not prevented by principles of res judicata from asserting the validity of the ordinance.

Brief in Support of Plaintiff's Motions for Summary Judgment, at 14, *Southwest Airlines Co.* v. *City of Dallas*, N.D. Tex., C.A. No. 3-74-344-C. It is too late now for Southwest to claim that the CAB carriers were bound after its many representations that they would not be bound.[12]

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[11] *See* p. 6 above at n. 3.

[12] For the same reason, § 111 of *Restatement Second of Judgments* (Tent.Dr. No. 4, 1977) has no application. Southwest cannot contend that it "was reasonably induced to believe that" the CAB carriers "would govern [their] conduct by the judgment in the original action" when it said over and over that they would not be bound by the judgment. *See also* n. 9 at p. 13 above.

In short, the court below incorrectly applied § 85(d) of *Restatement Second* to the facts of this case and overlooked compelling reasons why the CAB carriers should not be precluded in any event. The result falls short of the minimum requirements of due process.

The fact that, as the Fifth Circuit said, "the federal judiciary has never faced the precise question posed by the instant facts," 546 F.2d at 98 (App. 27a), does not mean that the issue presented is so unique, so unlikely to be repeated, that it does not merit the attention of this Court. These exact facts may not be repeated, but questions of preclusion by a judgment to which one was not a party arise every day, both in federal courts and in state courts, to which the due process limitations are also applicable. A commentator has detected in recent decisions

> an alarming judicial tendency to suspend the individual litigant's due process right to a "day in court" in favor of the public's interest in judicial finality, resulting in a dramatic expansion of the scope of the res judicata bar.

Comment, *The Expanding Scope of the Res Judicata Bar*, 54 TEXAS L. REV. 527, 528 (1976). The decision below, if allowed to stand, will give increased impetus to that tendency. If due process of law is to be eroded in favor of what is thought to be judicial efficiency, this Court should say so, and should define the limits to which this development can be taken.

2. Federalism Forsaken

Ever since the Reviser of the Judicial Code persuaded Congress in 1948 to overrule, in 28 U.S.C. § 2283, the decision of this Court in *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118 (1941), it has been clear that a federal court is not barred by the Anti-Injunction Act from staying proceedings in a state court "to protect or ef-

fectuate its judgments." But the fact that a case fits one of the exceptions to the Anti-Injunction Act does not mean that an injunction must, or even should, issue. "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum* v. *Foster*, 407 U.S. 225, 243 (1972).

Thus in *Lamb Enterprises, Inc.* v. *Kiroff*, 549 F.2d 1052 (6th Cir. 1977), it was held that those principles of equity, comity, and federalism made it error for a federal court to enjoin relitigation in a state court of a claim that was arguably barred by a prior federal court judgment. In the *Lamb Enterprises* case, unlike this one, the state court litigation involved precisely the same parties as had the federal court suit that had gone to judgment, and there was not involved there, as there is in the present case, a difficult question of state law on the allocation of power as between municipalities and a state agency. If it was wrong, as the Sixth Circuit held, to enjoin the state proceeding in the *Lamb Enterprises* case, then *a fortiori* it was wrong to enjoin the state court proceedings here.

The decision of the Fifth Circuit in the *City of Dallas* case rested wholly on a question of state law. That court, in an opinion by Judge Thomas Gibbs Gee, held that Texas law gives the TAC power to determine what airport within a city an intrastate carrier may use, and that this power in the Commission overrides any power of a city to make this decision for itself. 494 F.2d at 776-777 (App. 6c-7c). In the District Court in that case, Judge William M. Taylor, Jr., had made a similar determination as one of a number of grounds of decision. 371 F.Supp. at 1030-1031 (App. 25d-26d). Judge Gee and Judge Taylor are highly respected products of the Texas bar, "versed in the idiosyncrasies of Texas

law." *Harris County Commissioners Court* v. *Moore*, 420 U.S. 77, 90 (1975) (dissenting opinion). But as this Court said long ago in another Texas case:

> [W]e should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas.

Railroad Commission of Texas v. *Pullman Co.*, 312 U.S. 496, 499-500 (1941).

If this were a routine diversity case, the "forecast" of state law by a federal court is an acceptable resolution and ought to write an end to that litigation as between the parties to the case. So long as diversity jurisdiction remains, it is workable only if a federal court is deemed competent to determine state law for purposes of a particular case. But a long line of cases recognizes the impropriety of relying on a federal forecast where this would cause "needless conflict with the administration by a state of its own affairs," WRIGHT, FEDERAL COURTS 222 (3d ed. 1976), or, as this Court has formulated it, "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 814 (1976). Here, as in *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168, 172 (1942), "the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State." Later, in *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25, 28 (1960), where again the question was whether

state law barred a city from taking certain action, the Court cited the *Fieldcrest Dairies* case for the proposition that "where the issue touched upon the relationship of City to State, * * * we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." This Court has been particularly mindful of the damage that can be done to state policies by federal courts intervening in a state's systems of regulation such as Texas's systems for regulating air carriers and airports. As was said in *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 334 (1943): "Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts."

The Fifth Circuit finds this line of authority not controlling on the ground that all of those cases "involved truly unsettled questions of state law on internal affairs" and thus "distinguishes them from the instant case in which a Texas Supreme Court ruling, the Texas Constitution, and Texas statutes clearly dictated the federal decision." 546 F.2d at 93 (App. 15a). Perhaps Texas law does in fact give the TAC power to determine what municipal airport an intrastate carrier may use. If so, allowing the state litigation to proceed will confirm the forecast the federal courts have made and end the controversy. But if what seemed clear to the federal courts is not the reading the Texas courts would give to their local law, then the decision in the *City of Dallas* case has interfered with an allocation of function between state agency and city that Texas is entitled to make for itself, and the decision below, enjoining state court litigation, has prevented the petitioners from getting an answer that is authoritative rather than merely a forecast.

The fact is that Texas has two statutes bearing on this dispute, neither of which has ever been construed by any state court on any of the issues this controversy presents. The Texas Aeronautics Commisison Act was first adopted in 1945. It authorizes the TAC to certificate scheduled intrastate carriers, TEX. REV. CIV. STAT. ANN. art. 46c-6, Subdivision 3 (Supp. 1976) (App. 1h-6h), but with regard to airports its only power to "control, administer, and have jurisdiction thereover" is limited to those "donated or given to the state, or to the Texas Aeronautics Commission to be held by it in trust for the state." *Id.*, Subdivision 1 (App. 1h). The Texas Municipal Airports Act was first adopted in 1947. It provides for municipal ownership of airports and allows the municipality "to adopt, amend and repeal such reasonable ordinances, resolutions, rules, regulations and orders as it shall deem necessary for the management, government and use of such airport" so long as they are not "inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established pursuant thereto." TEX. REV. CIV. STAT. ANN. art. 46d-7 (1969) (App. 1i).

If the Aeronautics Commission Act in fact gives the TAC power to authorize an intrastate carrier to use a particular municipal airport, regardless of consent of the municipality, and if the TAC has in fact so authorized Southwest to use Love Field, though neither the certificate of public convenience and necessity nor Minute Order 22 makes any reference to Love Field,[13] then it is apparent from the language last quoted from the Municipal Airports Act that the cities could not interfere with that use. But neither of the Texas statutes says that the TAC has that power. The language in the Aeronautics Commission Act limiting the TAC's jurisdiction over airports to those owned by the state argues strongly against

[13] *See* p. 5 above.

it, as does the language of the Municipal Airports Act giving cities the power to determine "government and use" of their airports.

The only Texas decision even colorably in point is *Texas Aeronautics Commission* v. *Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex. Sup. 1970). That case held that the TAC, not the CAB, has the power to certify intrastate carriers, and that the TAC had not erred in finding that the public convenience and necessity justified certifying Southwest to operate to Dallas. That opinion contains not even a word of obiter on the power of the TAC to compel a city to allow a carrier to use its airport, or on the relationship between the Aeronautics Commission Act and the Municipal Airports Act.

"It may be that the Court of Appeals is correct in its 'forecast,'" *Boehning* v. *Indiana State Employment Ass'n, Inc.*, 423 U.S. 6, 7 (1975), on how the Texas statutes will be construed—but it also may be that it is wrong. Surely it is turning upside down usual principles of equity, comity, and federalism to say that a federal court should use the extraordinary remedy of an injunction to prevent litigation in the state court to find out authoritatively whether the forecast was sound or unsound and to prevent the courts of Texas from determining the meaning of Texas statutes. The fact that this injunction runs against those who were not parties to the litigation in which the forecast was made merely emphasizes the unusual character of what has happened below, and underlines the need for review here.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed.

Respectfully submitted,

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